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Get a handle on 'noncompetes'..(Company Business and Marketing)  
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ABSTRACT:

Many companies add restrictive 'non-compete' clauses to employment contracts in order to ensure that departing employees do not give trade secrets or other intellectual property to competitors. Potential employees should understand the elements and legality of such covenants when negotiating. A noncompete can constrain future jobs by type of company, geographic location, responsibility or any combination of the three. The restrictions last for a stated amount of time ranging from 90 days to five years or more; different states have varying views on the legality of highly restrictive covenants, which are generally recognized as (restraint of trade). Larger companies with reputations at stake are mostly likely to require restrictive covenants, although firms of any size may do so if they emphasize cutting-edge invention. The agreements are found at executive levels in all industries and product-development jobs in technology companies. Applicants should be aware of what negotiating ability they may have and of possible penalties for violating the agreement. Both employer and employee need to know other applications of non-compete principles as well.

TEXT:

Understanding the elements and the legality of the agreement can help determine negotiation tactics

IN A TIME when business success rides on finding new ideas and unique approaches to solve existing problems, protecting a company's intellectual property is vital. To ensure that trade secrets and strategies stay out of competitors' hands, some companies add restrictive covenants known as "noncompetes," into employment contracts. These clauses limit an employee's right to work for a competitor in the future, says Brian Greig, head of the labor and employment practice at Fulbright & Jaworski in Austin, Texas.

1. Get a handle on noncompete basics

A noncompete can constrain the employee's next job, by type of company, geographic territory, and responsibility. These clauses often detail how much time must pass before the employee may work in the same service area as the original employer. Noncompetes are intended to prevent one company from benefitting from information garnered from another company's former employee and may last from 90 days to five years or more, depending on the company and industry. In most states, the limitation "has to be tailored to the scope of the work the employee performs," Greig says.

"Different states have different views on the legality of restrictive covenants, given that they are generally recognized as a 'restraint to trade,' in that they prevent people from providing their labor for whomever they want to," Greig says. Several states, including California, Massachusetts, North Dakota, and Oklahoma, have outlawed these covenants altogether. Greig notes that courts in other states will rule differently in the application of noncompetes based on the particular case, such as a worker laid off as part of a downsizing decision versus one who quit or was fired for cause.

2. Know if a job is a noncompete candidate

"Restrictive covenants are generally going to be required by larger companies that have reputations that could more easily be tarnished, although that can go out the window these days with so much emphasis placed on new inventions," says a human resources manager at a large technology company, who requested anonymity. "Often, you see these for executives, CEOs, and vice presidents because they play in the strategic areas (and) have the big-money contracts. And if they change companies, it will often be among a circle of competitors."

Greig adds that in technology companies, noncompetes are also found at nonexecutive levels, especially in product development jobs, because "oftentimes, the people at the bottom really have as much exposure to trade secrets as anybody in the company."

3. Determine your ability to negotiate

Greig knows of some in-demand job seekers who "could pretty well write their own ticket," and refuse to sign a noncompete. But refusing a noncompete outright without leaving room for negotiation could send a company the message that a candidate is not willing to stick around very long, Greig warns.

"Negotiating (a noncompete) can be difficult if you're not sure of the exact terms or meanings," the human resources manager says. "Some employees request time to look over a contract with a lawyer. If you have that option and the company you're talking to is OK with that, it can be a good idea."

Greig suggests looking at the reasonableness of the individual elements in the clause, perhaps narrowing the scope of the area they cannot work in or reducing the duration.

4. Be aware of the penalties

Employees should not be fooled into thinking that companies will forget about noncompetes once a worker has moved on. Greig says the companies requiring covenants "are pretty serious about it these days."

Adoption and enforcement of restrictive covenants can be tricky with the rising amount of "employee raiding," in which companies specifically target and recruit employees from competitors. The human resources manager, however, advises employees to tread carefully because clause violation "penalties can be hefty." An employee can be enjoined by a court from working at their current company and be sued for damages suffered as a result of working for the competitor. In some states the former employee can also be called to pay attorney fees for the company enforcing the agreement, according to Greig.

5. Know other applications of these principles

Greig sometimes sees a situation he calls "the inevitable disclosure doctrine," when no noncompete has been signed, but an employee goes to work for a competitor in the exact job he or she previously held and "can't help but use information (the employee) learned from the (other) company that was secret. Courts looking at that situation may find that an employee would have to be prevented from working in a directly competitive position until that information is no longer of any value," even without a noncompete.

"While certainly (job seekers) need to trade on their learning, expertise, and knowledge, they need to be careful that they're not moving into a job that is exactly like the one they had at the prior company if they were exposed to trade secrets and confidential information there," Greig adds.

Intellectual property versus 'restraint to trade'

With noncompete agreements, the rights of employers and employees often conflict. In the fast-paced high-tech industry, where employee turnover is high and innovation is cutthroat, employers and employees alike must know their rights and legal responsibilities when considering noncompetes.

Search Report from Ginger R. DeMille

\* For the employer...

Protecting proprietary knowledge: Companies need to protect themselves against the possible loss of information -- such as business processes, source code, and technological innovations -- when an employee leaves for another job.

Drafting a solid noncompete: Depending on circumstances, a legally binding agreement might include time limits on when an employee can work for a competitor, geographical limits on where an employee may work, and field limits on the kind of company an employee may work for.

Imposing penalties: Through court enforcement, companies may expect injunctions against work as well as findings for damages and legal fees.

Using "inevitable disclosure": Some states allow companies to sue a former employee for disclosing information even without a noncompete.

\* For the employee

Educating yourself: Because laws vary from state to state, know the law in the state where you work. Often struck down by courts and even against the law in some states, noncompetes are seen as a "restraint to trade," restricting the employee's right to sell his or her labor.

Leaving your job: Why you depart from a company affects the legal interpretation of your noncompete, depending on whether you quit, were laid off, or were fired for cause.

Negotiating: Use your experience and skills to leverage a more favorable noncompete. Aim to lower the time limits or scope of the agreement.

Knowing what you are signing: Noncompetes may carry stiff penalties for violation. Make sure that what you are signing is reasonable. Consult an attorney.

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